



POLICE DEPARTMENT

November 27, 2019

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In the Matter of the Charges and Specifications	:	Case No.
- against -	:	2017-18154
Sergeant Dany Fana	:	
Tax Registry No. 944547	:	
41 Precinct	:	

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At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Nancy R. Ryan
Assistant Deputy Commissioner Trials

APPEARANCES:

For the CCRB-APU: Claudia Avin, Esq.
Civilian Complaint Review Board
100 Church Street, 10th Floor
New York, NY 10007

For the Respondent: John D'Alessandro, Esq.
The Quinn Law Firm
Crosswest Office Center
399 Knollwood Road Suite 220
White Plains, NY 10603

To:

HONORABLE JAMES P. O'NEILL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

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CHARGES AND SPECIFICATIONS

1. Sergeant Dany Fana, on or about May 10, 2017, at approximately 2219, while assigned to 041 PCT and on duty, in the vicinity of [REDACTED], Bronx County, wrongfully used force, in that he punched and kicked Individual 1 without police necessity.

P.G. 221-02, Page 2, Prohibition 11

USE OF FORCE

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on October 22, 2019. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having reviewed all of the evidence in this matter, I find Respondent Guilty and recommend a penalty of the loss of 20 vacation days.

ANALYSIS

It is undisputed that on the night of May 10, 2017, Respondent was on duty in the area near [REDACTED] in the Bronx. Respondent, assigned to anti-crime, was in plain clothes in an unmarked car. He was the operator while Police Officer Ramirez was in the passenger seat. Respondent encountered Individual 1. During the encounter Respondent punched and kicked Individual 1. The issue in this case is whether Respondent wrongfully used force, without police necessity, on Individual 1.

CCRB's case consisted of a transcript and audio CD of an interview given by Individual 1, hospital records and photos pertaining to Individual 1, and a video of portions of the incident in question. Individual 1, despite being contacted and ultimately subpoenaed by CCRB to appear at trial, did not appear.

In his statement given to CCRB on May 26, 2017, Individual 1 described several encounters he had with the police on the evening of May 10, 2017. Individual 1 stated earlier in

the

evening he saw four police officers, one of whom asked Individual 1 for his ID and searched him and his book bag (CCRB Ex. 1A at 8-9, 14-16, 20-22, 24) All of these officers, none of whom was Respondent, left and Individual 1 walked about two blocks towards his house and went to a store in his building. (CCRB Ex. 1A at 29-31)

As Individual 1 left the store and walked across the street, a car with “massive tinted” windows stopped in the middle of the street near him. Two males in plain clothes with “badges” around their necks got out of the car. The one he described as dark-skinned Spanish with spiky black hair got out of the passenger side of the car. He told Individual 1 to get on the floor and before a minute passed the male punched him. Individual 1 also stated that the male punched him while he said to get down. The one punch was to the left side of Individual 1’s face. Individual 1 then blacked out and remembers that once he woke up he was in handcuffs. (CCRB Ex. 1A at 32-38) His mother told him she was looking out a window and saw the same officer punch him multiple times. (CCRB Ex. 1A at 38) In response to the CCRB Investigator’s questions, Individual 1 said he did not drop anything onto the police vehicle prior to being punched and he did not consume any alcohol during the incident.¹ (CCRB Ex. 1A at 49-50)

Individual 1 was transported to Lincoln Hospital from the scene of the incident. (Tr. 41) Hospital records indicate that Individual 1 presented with left facial edema and he underwent a brain and facial bone CT which were negative for acute pathology. He was prescribed ibuprofen and was discharged to home. The hospital records indicate that Individual 1 reported he was in an altercation with the police who struck him in the face. (CCRB Ex. 4)

Individual 1 submitted photos of his face to CCRB. He told CCRB that he took photos of his face the day after the incident. The photos show bruising to Individual 1’s face. (CCRB Ex.

2)

¹ There is [REDACTED] and a comment that the patient admitted to drinking that night. (CCRB Ex. 4)

Respondent testified that he was on-duty on May 10, 2017, assigned as an anti-crime sergeant. He was in a car with Police Officer Ramirez driving on [REDACTED] towards [REDACTED] when he saw a man in the street blocking their path. The man, who was Individual 1 was yelling, "I hate you. I'll kill one of your guys. I'll shoot you." Individual 1 started to yell, "Get out the car." He was "very aggressive" and was pulling his pants up. Respondent described Individual 1 as "a little disturbed and angry." Individual 1 spat towards the car. Respondent's vehicle continued to move straight ahead. As Respondent's vehicle passed by Individual 1, Respondent heard a loud bang and felt the vehicle shake like it had been kicked. Respondent's vehicle then stopped. Respondent, who got out of the vehicle with the intention of arresting Individual 1, took his Taser out of its holster as soon as he exited his vehicle, pointed his Taser at Individual 1 and told him to get on the ground. After reviewing the video of the incident, Respondent now knows that he struck Individual 1 as he approached him. He testified that he hit Individual 1, in a matter of seconds after exiting his vehicle, because as he approached him with his Taser he saw Individual 1 tensing up. Individual 1 had his fist clenched and was still yelling, "I'll kill you." Respondent further testified that he didn't want to get hit in the face so he made the decision to use force.

After Individual 1 went to the ground there was a struggle. Respondent testified that Individual 1 grabbed Officer Ramirez and tried to bring him down. Respondent struck Individual 1 again. Individual 1 was then handcuffed. (Tr. 12-14, 27, 30, 56) Respondent called EMS for Individual 1. (Tr. 59)

Respondent testified that Individual 1 sustained a laceration and swelling to his face. Respondent documented those injuries and prepared a force report when Individual 1 was sent to the hospital. (Tr. 14)

On cross-examination, Respondent testified that after he exited his vehicle, he determined that Individual 1 was an emotionally disturbed person. (Tr. 21) Also on cross-examination, despite

testifying on direct that he struck Individual 1 when he first approached him, he testified that he swung at Individual 1 but is not sure if his hand connected with Individual 1. (Tr. 31) Respondent acknowledged that when he approached Individual 1, his hands were down, he had no weapon, he wasn't fidgeting with his pocket or his waistband, nor did Individual 1 move towards Respondent but rather was just standing there. (Tr. 32) Respondent also acknowledged that when Individual 1 was on the ground he kicked him and swung at him several times hitting him in the face. (Tr. 34-36) Later in his testimony, Respondent states he is not 100% sure if his punches landed on Individual 1's face. (Tr. 42)

On re-direct examination in response to his counsel's questions, Respondent agreed with his counsel's phrasing that he was not denying he punched Individual 1 in the face but was just saying he was not sure if all his punches connected with Mr. Brito's face. When asked to explain what he meant by saying that Individual 1 was standing in an aggressive manner, Respondent testified that Individual 1 was yelling, and had his fist clenched. Respondent thought Individual 1 was looking at him like he was going to punch him. (Tr. 47) Respondent swung at Individual 1 while he was on the ground because Individual 1 was resisting being handcuffed by Officer Ramirez. (Tr. 53) Respondent testified that Individual 1 was moving and twisting his body and was trying to get up. (Tr. 53, 60)

Respondent testified that even though he had his Taser pointed at Individual 1 he swung at him because he thought a punch was the appropriate minimum force he could use. (Tr. 59)

During the incident, Respondent sustained swelling to his own right hand, but he is not sure if it was from punching Individual 1 or from the struggle with Individual 1. (Tr. 37) Individual 1 was not charged with any crimes based on this incident because Respondent, based on how Individual 1 acted during the incident, came to believe Individual 1 was an emotionally disturbed person. (Tr. 54)

CCRB introduced a video of portions of the incident. (CCRB Ex. 3) In the video, Individual 1 can be seen walking into the middle of the street and stopping there while Respondent's vehicle approaches. (CCRB Ex. 3 at approximately :13 to :30 seconds) Respondent's vehicle can be seen stopping. Individual 1 then moves towards the passenger side of the vehicle and walks along side of it while the vehicle moves ahead. (CCRB Ex. 3 from approximately :32 to :57 seconds) It then appears that Individual 1 throws something at Respondent's vehicle which he then bends down to pick up. (CCRB Ex. 3 at approximately :58 seconds to 1:02 minutes) Respondent and his partner exit the vehicle and Respondent walks directly towards Individual 1 with his Taser pointed at Individual 1 does not appear to be moving and his arms appear to be at his side. Respondent throws a right handed punch towards Individual 1 who then recoils backwards. (CCRB Ex. 3 at approximately 1:02 to 1:12 minutes) When Individual 1 appears to be kneeling on the ground, Respondent kicks him. (CCRB Ex. 3 at approximately 1:18 minutes) Individual 1 is on the ground with Respondent and his partner standing above him. The partner takes a step away and then turns towards Individual 1 is on the ground and his legs do not appear to be moving when Respondent swings at Individual 1 three times. (CCRB Ex. 3 at approximately 1:27 to 1:52 seconds)

Respondent is charged with using excessive force in punching and kicking Individual 1. Under Patrol Guide Section 221-02, page 2 Prohibition 11, a member of service must apply no more than reasonable force necessary to gain control. Under Patrol Guide Force Guidelines, force may be used when it is reasonable to ensure the safety of a member of the service or a third person, or otherwise protect life, or when it is reasonable to place a person in custody or to prevent escape from custody. In all circumstances, any application of force must be reasonable under the circumstances.

In this case Respondent admitted to kicking Individual 1 and while vacillating throughout his testimony as to whether his punches landed on Individual 1's face he answered his counsel's question on redirect by saying he was not denying he punched Individual 1 in the face. The question therefore becomes whether Respondent's actions constituted an appropriate use of force. I find that they do not.

First of all, I find that Respondent did not merely swing at Individual 1 when he first approached him but that he actually did punch him. Respondent's persistent shifting of his testimony concerning whether he did or didn't punch or "connect" with Individual 1 leads the court to question the credibility of Respondent's testimony surrounding the force he used. In addition there is evidence that the punch landed on Individual 1, in his statement to CCRB told CCRB that he was punched upon the officer's initial encounter with him. While this statement is hearsay, it is supported by the video which shows Individual 1's body reacting to the swing as if it did connect with him.

As the court finds by a preponderance of the evidence that Respondent did punch Individual 1 when he first approached him the question becomes whether that punch was a reasonable use of force by Respondent. I find that it was not. According to Respondent's own description of Individual 1's actions, which are supported by the video, at the time Respondent initially punched Individual 1 was simply standing with his arms down and was not making any motions towards Respondent which would have justified Respondent believing that Individual 1 was going to attack him. Respondent testified that Individual 1 wasn't complying with an order to get down, but as can be seen in the video, and as acknowledged by Respondent, it was a matter of mere seconds after Respondent walked up to Individual 1 before he swung at him. Respondent's assertion that he could see in Individual 1's eyes that Individual 1 was intending to punch him is clearly not a sufficient justification for punching Individual 1. Also, even if Individual 1 was using

abusive language towards Respondent or was clenching a fist which remained down at his side, these actions alone would not amount to justification for Respondent punching Individual 1 in the face while Individual 1 was standing still with his arms down. Respondent is Guilty of wrongfully using force based on this initial punch alone.

Respondent's case is clearly distinguishable from cases where the use of a punch by a member of service was found to be a justifiable use of force. See Disciplinary Case No. 2016-16618, signed January 10, 2019, where a fifteen-year sergeant was found Not Guilty of wrongfully punching an individual in the face without police necessity. Respondent acknowledged punching the fleeing suspect/complainant, in the face after observing the individual with a gravity knife. See also Disciplinary Case No. 2016-16666, signed October 16, 2017, in which a four-year police officer was found Not Guilty of punching a civilian in or about his face, without police necessity. A complainant threatened to punch respondent, made multiple profane comments and struck respondent squarely in the forehead with his cap.

Respondent, however, also kicked Individual 1 and swung at him three more times while Individual 1 was on the ground. As seen on the video, Individual 1 appeared to be on his hands and a knee and not making any movements at all at the time Respondent kicked him. Respondent testified that Individual 1 was not complying at this point but did not elaborate on what he meant by this. He testified that he might have been telling Individual 1 to put his hands behind his back. (Tr. 52-53) Based on my review of the video, with no testimony to support a justifiable reason for Respondent's use of the kick, I find it more likely than not that the kick was an unreasonable use of force in the situation.

Similarly, while the video is not completely clear as to what Individual 1 was doing at the time Respondent swung at him while he was on the ground, it does not appear that the three punches were a justified use of force. Based again on Respondent's testimony concerning his

actions, in which he doesn't deny he punched Individual 1, the court concludes that it was more likely than not that Respondent punched Individual 1 while he was on the ground. Respondent, although describing that Individual 1 was moving and twisting his body, did not give the court sufficient grounds to conclude that throwing three punches at Individual 1's head was the reasonable use of force necessary in this situation to control Individual 1. Respondent never testified that he tried to grab Individual 1's hands to help Officer Ramirez try to cuff him before he punched Individual 1. He also never testified that he felt he had to punch Individual 1 to unlock his hands to place cuffs on them, as in situations where a suspect stiffens up and won't release their hands from under their body. Instead, Respondent resorted to punching Individual 1's face. The evidence does not support a conclusion that the force used was reasonable but rather that it was a wrongful use of excessive force. Respondent is Guilty of Specification 1.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on July 9, 2007. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

CCRB has requested a penalty of the loss of 15 vacation days. That recommendation is inadequate. In cases with similar fact patterns a penalty of the loss of 15 vacation days was imposed. In Disciplinary Case No. 2016-15603, signed October 6, 2017, a four-year police officer, with no disciplinary history, forfeited fifteen (15) vacation days for wrongfully punching an arrestee about the face without police necessity. The complainant claimed respondent punched him in the face with his right hand while arresting him for an open bench warrant;. See also Disciplinary Case No. 2015-14379, signed May 23, 2017 (seventeen-year detective, with

one prior adjudication, forfeited 15 vacation days for striking an individual in the face without police necessity. After pushing the individual down to the ground, and placing one handcuff on his left wrist, respondent repeatedly ordered the individual to give him his right arm. When the individual did not comply, respondent punched him once in the face to try to gain compliance. The individual was not engaging in any active aggression or active resistance at the time he was punched and respondent had obtained control over him. Thus, respondent's punch to the face was in violation of the Patrol Guide which demands that MOS use the minimum force necessary.)

In the instant case however, while Respondent does not have a prior disciplinary history as in the case above, Respondent is a Sergeant and as such should have modeled the appropriate use of force for the police officer who was working with him at the time of the incident. Instead, he repeatedly and gratuitously struck an individual without police necessity. I therefore recommend a penalty of the loss of 20 vacation days.

Respectfully submitted,



Nancy R. Ryan

Assistant Deputy Commissioner Trials

APPROVED

APR 21 2020

DERMOT SHEA
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
SERGEANT DANY FANA
TAX REGISTRY NO. 944547
DISCIPLINARY CASE NO. 2017-18154

Respondent was appointed to the Department on July 9, 2007. On his last three annual performance evaluations, he received a 5.0 overall rating of "Extremely Competent" for 2018 and 4.5 overall ratings of "Extremely Competent/Highly Competent" for 2016 and 2017. He has received 10 medals for Excellent Police Duty and 12 medals for Meritorious Police Duty.

[REDACTED]

Respondent has no formal disciplinary history.

For your consideration.

Nancy R. Ryan
Assistant Deputy Commissioner Trials